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8 *Appearing In Propria Persona*

9
10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE DISTRICT OF ARIZONA**

12 IN RE: Bard IVC Filters Products
13 Liability Litigation

14 No. MDL 15-02641-PHX-DGC

15 **REPLY BRIEF OF THE LAW**
16 **OFFICES OF BEN C. MARTIN**
17 **AND MARTIN|BAUGHMAN,**
18 **PLLC IN SUPPORT OF THEIR**
19 **MOTION TO REDUCE AND**
20 **EXEMPT CLIENT RECOVERIES**
21 **FROM COMMON BENEFIT FEE**
22 **AND EXPENSE ASSESSMENT**

23 **I. INTRODUCTION**

24 The Law Offices of Ben C. Martin and the law firm of Martin | Baughman
25 (collectively, “BCM”) respectfully submit this Reply Brief in further support of their
26 Motion to Reduce and Exempt Client Recoveries from Common Benefit Fee and Expense
27 Assessment.

28 In its Response in Opposition, the Common Benefit Fees and Costs Committee
argues that BCM should be deemed to have signed a Participation Agreement, obligating
its current and future clients without regard to their connection to this MDL proceeding to

1 have fee and cost assessment holdbacks paid into a fund created by this Court to
2 compensate for Common Benefit work performed in this MDL proceeding.

3 As BCM made clear in its initial Memorandum of Law, BCM concedes that it is
4 obligated to have these holdbacks assessed against the recoveries achieved in the cases in
5 which BCM represented clients whose cases were a part of the MDL proceeding, although
6 in those cases BCM is seeking to have the assessments applied only to the portion of the
7 recoveries fairly traceable to the efforts of the Common Benefit work.
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10 Although Judge Chhabria's now-published ruling from last June in *In re: Roundup*
11 *Products Liab. Litig.*, 544 F. Supp. 3d 950 (N.D. Cal. 2021), which is currently on appeal
12 to the Ninth Circuit, is not binding on this Court, the decision represents a very recent, and
13 very insightful, examination of the sort of arguments and considerations that BCM's
14 present motion requires this Court to resolve. As Judge Chhabria — a careful, fair, and
15 scholarly judge who has a distinguished background that includes having clerked for
16 Justice Breyer on the U.S. Supreme Court — recognized in *In re: Roundup*, applying MDL
17 Common Benefit holdbacks in non-MDL cases — including state court cases, federal court
18 cases that were never a part of the MDL proceeding, and unfilled cases — stretches and
19 may very well exceed the boundaries of federal court authority even in cases in which the
20 lawyer for such parties signed a Participation Agreement and/or also represented other
21 clients whose cases were a part of the MDL proceeding.
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24 Because Judge Chhabria's ruling in *In re: Roundup* has been appealed to the Ninth
25 Circuit, it could very well be transformed into binding Ninth Circuit precedent in the not
26 too distant future, and thus the decision is not as easily dismissed as the Common Benefit
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1 Fees and Costs Committee pretends it to be in its Response in Opposition. BCM
2 respectfully submits that the discussion and resolution of the issues raised herein, contained
3 in the *In re: Roundup* opinion, are far more persuasive than what the Committee has offered
4 in its Response in Opposition.
5

6 **II. BCM'S REPLY TO THE FACTUAL AVERMENTS CONTAINED IN THE**
7 **COMMITTEE'S RESPONSE**

8 The Committee does not dispute that over half of the cases in which BCM has
9 secured settlements from Bard are cases that have yet to be filed in any court, state or
10 federal, or that BCM also has a sizeable number of clients whose cases were filed in federal
11 court after the close of the MDL and thus were never part of the MDL.
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13 The Committee responds by arguing that BCM should be deemed to have signed a
14 Participation Agreement, thereby obligating both current and future clients of BCM who
15 had claims against Bard, whether their cases were filed in state court, in federal court after
16 this MDL proceeding concluded, or never filed in any court, to pay the same fee and costs
17 assessment holdbacks that applied to the cases that were a part of this MDL proceeding.
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20 Next, the Committee observes that BCM accessed the Common Benefit materials
21 over 5000 times, even though the Committee's Orwellian tracking of that data proves
22 nothing, as BCM clearly was entitled to access that material an unlimited number of times
23 in connection with its MDL cases. How many times BCM accessed the material proves
24 nothing, because fees were not being assessed on a per access basis. Moreover, had BCM
25 simply downloaded the materials to its own internal database, BCM could have made
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1 exactly the same use of those materials while accessing them via the Dropbox site fewer
2 than a dozen times.

3 Furthermore, that the Committee has chosen to reimburse some state court activity
4 as Common Benefit work does nothing to establish that recoveries that are achieved in state
5 court litigation can or should be assessed Common Benefit fees and costs holdbacks in this
6 MDL proceeding. Those are two entirely separate inquiries that can produce differing
7 outcomes without any internal inconsistency. That some state court work turned out to be
8 for the Common Benefit fails to confer on the MDL court the power to impose fees and
9 costs on plaintiffs and cases not actually pending before it.

10 The hypothetical that the Committee offers, whereby a law firm “could simply have
11 filed a single, low value, placeholder case in the MDL and, through forum shopping or
12 tolling agreements, avoided assessments on hundreds or thousands of cases that all
13 benefited from the MDL work product,” Committee’s Resp. at 8, does not describe what
14 happened here and is unrealistic in the extreme. BCM and other law firms in comparable
15 situations must always act in the best interests of their clients, who have the need and desire
16 for prompt compensation and whose cases have filing deadlines that are not realistically
17 subject to evasion through the methods that the Committee hypothesizes.

18 Next, the objections from the Committee and from Bard regarding confidentiality
19 concerns are overblown. BCM is not seeking to discover specific settlement amounts in
20 specific cases. Rather, all that BCM seeks, for this Court’s review under seal, is the average
21 recovery achieved in cases that settled before remand in this MDL proceeding, so that this
22

1 Court can compare that number against the average result that BCM achieved in its
2 remanded MDL cases.¹

3 Lastly, whether or not BCM objected to the Committee's earlier requests concerning
4 the holdback percentages that the Committee requested for Common Benefit fees and costs
5 does not give rise to waiver, because BCM is not challenging those percentages here.
6 Rather, BCM merely challenges which recoveries, and what portion of certain recoveries,
7 those percentages are assessed against. Moreover, per this Court's order setting the
8 assessment, "the 8% assessment for attorneys' fees represents a holdback, not a
9 determination of the final amount to be disbursed out of the common benefit fee fund."
10 Order at 3, Doc. No. 18038 (5/31/2019).²

14 **III. ARGUMENT IN REPLY**

15 **A. Judge Chhabria's Highly Persuasive Decision In *In re: Roundup*, Rather** 16 **Than The Third Circuit's Unpublished Decision in *Avandia*, Should Guide** 17 **This Court's Decision Whether To Exclude Unfiled Cases, State Court** 18 **Cases, And Post-MDL Federal Cases From Any Fee Or Costs Assessments**

19 In *In re: Roundup Products Liab. Litig.*, 544 F. Supp. 3d 950 (N.D. Cal. 2021), U.S.
20 District Judge Vincent Chhabria concluded that an MDL court simply lacks the power to
21 tax fees and costs for MDL work product against clients whose cases were never filed in
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24 ¹ Although Bard, in its response in opposition, appears to humorously question
25 BCM's assertion that BCM achieved a better than average recovery for BCM clients
26 following remand of their cases from this MDL proceeding, Bard's response fails to assert
that it has reviewed the relevant data to determine whether BCM is correct, nor does Bard
supply that data to this Court, to BCM, and to the Committee for their review.

27 ² BCM objects to the Committee's suggestion that the entirety of BCM's attorneys'
28 fees from the Bard settlement be escrowed. There is no conceivable outcome where the
Committee's claim would be of greater value than the 10% holdbacks plus the interest that
would accrue via BCM's escrow request.

1 any court and clients whose cases were pending in state court, but that even if he had such
2 power, he would decline to impose the assessments. *Id.* at 962-73. Given the limited space
3 available in this Reply Brief, BCM simply commends Judge Chhabria’s highly convincing
4 opinion to this Court’s attention, as it carefully and persuasively addresses all of the
5 relevant considerations now before this Court and concludes that assessing fees and costs
6 against state court cases, non-MDL federal court cases, and unfilled cases would be
7 improper and inappropriate even if within his power.
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10 In response thereto, the Committee relies heavily on an unpublished, and thus non-
11 precedential, ruling of the U.S. Court of Appeals for the Third Circuit in *In re Avandia*
12 *Marketing, Sales Practices & Products Liab. Litig.*, 617 Fed. Appx. 136 (3d Cir. 2015). In
13 that decision, which due to its unpublished nature does not even constitute binding
14 precedent on the Third Circuit or on federal district courts within the Third Circuit, the
15 court concluded that where an attorney had executed a participation agreement that the
16 district court later adopted as an order of the court, the district court had jurisdiction over
17 the attorney to require that MDL fee assessments be paid from the attorney’s state court
18 cases.
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22 The outcome in *Avandia*, which Judge Chhabria accurately characterized as
23 “strange” in his opinion in *In re: Roundup*, 544 F. Supp. 3d at 968, places tremendous
24 weight on a lawyer’s ability to agree to bind current and future clients whose cases are not
25 otherwise under the control of the MDL court. Even if an attorney can bind his current and
26 future clients with regard to his attorney fee entitlement — notwithstanding that an attorney
27 fee is initially a part of the client’s recovery in all cases including non-MDL cases — the
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1 costs assessment that the Committee seeks is charged directly against the portion of the
2 recovery belonging to the client in the Bard MDL proceeding, and thus it is quite doubtful
3 that any attorney agreement suffices to obligate clients whose cases are not a part of the
4 MDL proceeding to pay such costs assessments.

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6 The Fourth Circuit's published opinion in *In re Showa Denko K.K. L-Tryptophan*
7 *Products Liab. Litig.-II*, 953 F.2d 162 (4th Cir. 1992), is far more persuasive than the Third
8 Circuit's unpublished opinion in *Avandia*. In common with the Ninth Circuit and Eighth
9 Circuit rulings that BCM cited in its opening brief, the Fourth Circuit in *Showa Denko*
10 concluded that a federal district court in that MDL proceeding "simply has no power to
11 extend the obligations of its order" regarding common benefit fee and costs assessments
12 against "[c]laimants who have not sued and plaintiffs in state and untransferred federal
13 cases" who have not voluntarily entered into the MDL litigation. *Id.* at 166.

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15 In accordance with the legal authorities discussed above and in BCM's opening
16 brief, BCM clients whose cases were pending in state court, whose cases were never filed
17 in any court, and whose cases were filed in federal court after this MDL proceeding
18 concluded should not have any MDL fees or costs holdbacks assessed against their
19 recoveries.

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23 **B. Because The Enhanced Recoveries That BCM Clients Whose Cases Were**
24 **Part of the MDL Received Were Due Almost Entirely To BCM's Own**
25 **Work, Equity Demands A Reduction In The Fee And Costs Assessments In**
26 **Those Cases**

27 In its opening brief, BCM proposed that the fair and equitable outcome with regard
28 to fee and costs assessments on BCM's cases remanded from this MDL proceeding would

1 be for each such settled case to be assessed for fees and costs at the average assessment
2 amount paid on cases that settled solely as the result of the common fund materials and
3 work.
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5 That outcome would necessarily provide a fair payment for common fund work in
6 each of the cases in which BCM represented clients whose cases were part of this MDL,
7 but it would avoid penalizing BCM for its extra work and resulting unique success in these
8 cases, while unfairly rewarding the common fund attorneys for results above and beyond
9 the average recovery that were in no way attributable to their efforts. Moreover, as
10 explained in BCM's opening brief, because thrombosis injuries were inadequately
11 addressed in the MDL,³ BCM clients with such injuries should not be subject to any fee or
12 cost assessment.
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15 The Committee's and Bard's objection that this would require disclosing
16 confidential information is incorrect, for reasons that BCM has already explained above.
17 All that is required to perform this evaluation is comparing two average recovery numbers,
18 nothing more.
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25 ³ In its response, the Committee admits that "clotting due to filter placement was
26 not a signature injury that leadership was charged with developing." Committee's Resp.,
27 Doc. No. 22149 at 10. The Committee then incorrectly asserts that it did develop this issue,
28 citing case specific trial testimony discussing a fractured filter fragment that had migrated
to a plaintiff's pulmonary artery. This testimony is not a general opinion contained in an
expert report that remanded MDL plaintiffs could have relied upon, nor does the testimony
address formation of clots on filters that remain in the IVC.

1 **IV. CONCLUSION**

2 For the foregoing reasons, BCM respectfully requests the issuance of an order
3 excluding BCM clients whose cases were never part of this MDL proceeding (because they
4 were never filed, they were filed in state court, or they were filed in federal court after the
5 close of the MDL) from any obligation to pay a fee or costs holdback in this case. And
6 BCM also respectfully requests that the amount of fee and costs holdback to be applied to
7 its remanded MDL cases be capped at the average fee and costs holdback paid on those
8 cases that settled solely as the result of common fund work, while excluding altogether
9 cases involving thrombosis injuries.
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13 RESPECTFULLY SUBMITTED this 15th day of February, 2022.
14

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2022, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing and provided a copy via email to the following:

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